



## What we did and why we did it

Recent experiences with Covid-19 have raised legal issues with respect to labour rights and employment law. Covid-19 has changed the workplace and workforce—many people have lost their jobs; many organizations have changed to an online environment.

On March 26, 14 invited participants met online. They included academics as well as representatives of agencies and societies that represent businesses and various sectors in Halifax.

Malcolm Boyle (McInnes Cooper) presented on employment law and questions arising from Covid-19. (Slides available.) The content of the presentations and the issues arising were discussed further by participants.

Participants spoke from their professional and personal experience. Their comments are summarized below but not attributed.

## About the MacEachen Institute

The MacEachen Institute for Public Policy and Governance at Dalhousie University is a nationally focused, non-partisan, interdisciplinary institute designed to support the development of progressive public policy and to encourage greater citizen engagement.

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## Labour Issues and COVID-19: Roundtable Discussion

### Presentation

Employment during emergencies has been a concern throughout history. During the Black Death, the Statute of Labourers was issued to mandate that all able-bodied workers be paid at pre-plague wage levels. Today, we have legislation that mandates workers' rights. The Occupational Health and Safety Act provides for safe and healthy working conditions, outlines employers' duties to protect employees, and specifies employees' duty to protect themselves (e.g. the right to refuse unsafe work).

Employees' duty to protect themselves has limitations; during the SARS pandemic many workers tried unsuccessfully to refuse work they deemed unsafe. Depending on the applicable statute, an employee refusing work must be able to prove the presence of a danger, not merely a risk of danger, or, as under Nova Scotia's OHS Act, that they had reasonable grounds to believe there was a likely danger to them or another. Human rights legislation prohibits discrimination based on many characteristics, such as disability and family status. Employers must accommodate employees on protected grounds up to the point of undue hardship. If employers can accommodate a request, they are expected to do so. Privacy legislation is also not suspended during a pandemic.

Employment standards' legislation in various provinces has also introduced leave options, including emergency leave. In Nova Scotia, this legislation is called the Labour Standards Code. According to the Labour Standards Code, employers must follow statutory notice requirements to lay-off employees. If the lay-off is outside the employer's control, however, then the statutory notice requirements may not have to be adhered to as long as the employer has exercised due diligence. Employment Insurance (EI) has also introduced additional supports for workers who are unemployed. While going on Employment Insurance is recommended, not all employers pay top-ups on EI contributions, and therefore, not all employees receive the same EI benefits.

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## Presentation continued

Following SARS, grounds for insurance claims were expanded to allow for quarantine. During COVID-19, we have seen the introduction of specific benefit programs like the Canadian Emergency Response Benefit (CERB), which may be available to employees who are affected by COVID-19 and may not otherwise be eligible for EI. Vacation pay also has some options; however, there is no legal obligation for the employer to pay vacation pay when an employee is laid off. Employer contracts and collective agreements are also key to addressing the rights of workers.

A temporary lay-off can occur, but can be complicated for both the employer and employee. The temporary lay-off could be considered a termination, in which case the employee is entitled to more support (e.g., severance pay). Whether or not lay-offs due to COVID-19 could be considered a termination is up for legal debate. Howard Levitt has argued that employees in temporary lay-off situations are entitled to common-law damages, while others have argued that these particular circumstances mean that temporary lay-offs cannot be considered as constructive dismissal or termination (i.e. the employer did not intend to terminate the employment relationship and had reasonable expectations to return the employees to work). Employers can request that employees waive their right to common-law damages in exchange for some consideration. Another mechanism may be for the federal and provincial government to issue orders, as applicable, to employers in their relevant jurisdictions that state COVID-19 lay-offs cannot be considered constructive dismissal. Until then, many organizations are having to make difficult decisions and lay off employees with the possibility of future risks.

## What we Discussed

Nurses in Ontario state they are being forced to work without protective gear; questions are arising about the Occupational Health and Safety Act and what the standards are to refuse work. After SARS, nurses made a Charter challenge against the Ontario government claiming that the nurses didn't receive accurate information about SARS, and that the work was dangerous. The primary standard to refuse work is to prove that health and safety measures that were adhered to in advance of an emergency are no longer in place. For example, nurses would have to demonstrate that they did not have the same access to safety equipment that they had access to before the outbreak.

The groups discussed how we can return to a state of normalcy from this shutdown. To restart the workforce as normal, we must consider how much risk we can tolerate, especially if the virus resurfaces. Incremental changes and phases are one approach to try to manage this. We must also anticipate the demand for services and what workforce will be needed to meet that demand. There is the question of standards and how these will be introduced. Will government request that businesses start up again, or will industries lead the relaunch? How standards are established and how decisions are made are key considerations. Additional questions were raised about whether governments and medical officers should make suggestions or requirements. Like other safety legislation (e.g. speed limits), we should not base health and safety on voluntary compliance.

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There have been many emerging innovations and examples of entrepreneurialism by businesses in response to COVID-19. For example, restaurants are changing service options (take out and delivery). With all the changes occurring rapidly, questions were raised about an employer's flexibility to change job descriptions quickly. While changing fundamental terms in an employee contract can be an issue (e.g. can amount to constructive dismissal), current circumstances may mean that the courts would feel it is justified. When the workforce restarts after this outbreak, employers that temporarily laid off workers must call those workers back based on need and objective standards (e.g. seniority). In the meantime, we are in a complicated and unusual situation. Social distancing measures have also caused employers to rethink office spaces designed as open collaborative spaces. Additionally, employers now have the responsibility to ensure employees have the proper set-up to work from home; however, it can be challenging to secure supplies.

Implications for temporary foreign workers are also a key concern for both employers and employees. The obligation will be on the employees to self-isolate for two weeks upon arrival, but putting the responsibility on the employer may be necessary to ensure employees can reasonably self-isolate for those two weeks. There are also uncertainties about additional outbreaks of COVID-19 in the near future. Scenario planning can be an effective tool to help organizations plan for a variety of variables (e.g. whether or not the borders are open).

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### **More from the MacEachen Institute**

The Institute is working to create resources and policy discussion around the COVID-19 crisis. These include briefing notes like this one as well as panel discussions, videos and media commentary. You can find [all resources related to COVID-19 on our website](#).

### **Other briefing notes in this series**

- Quarantine and COVID-19
- People with Disabilities and COVID-19

This briefing note was prepared by MacEachen Institute Research Assistant Kaitlynn Lowe.